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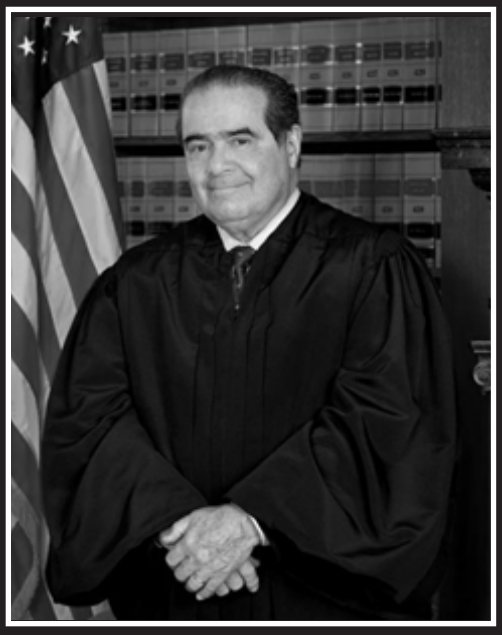
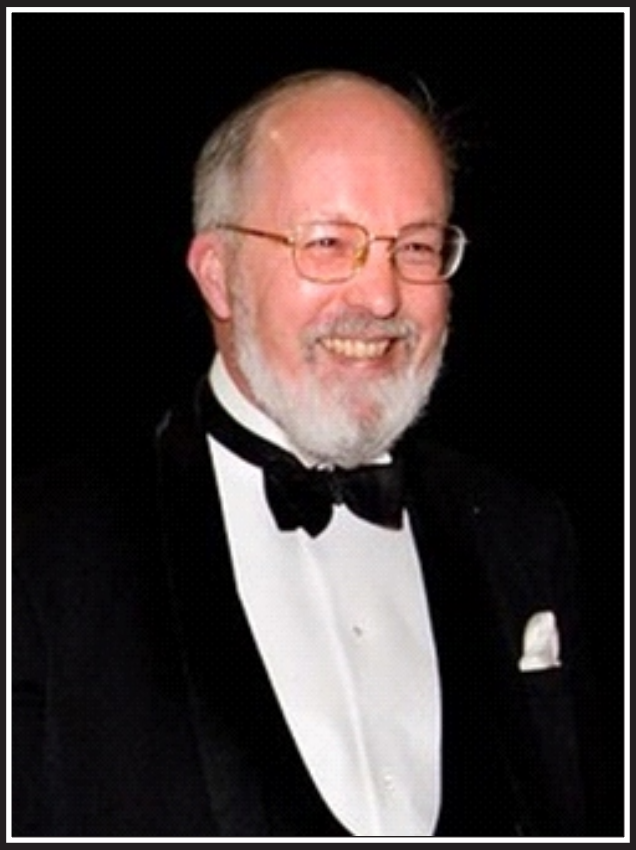
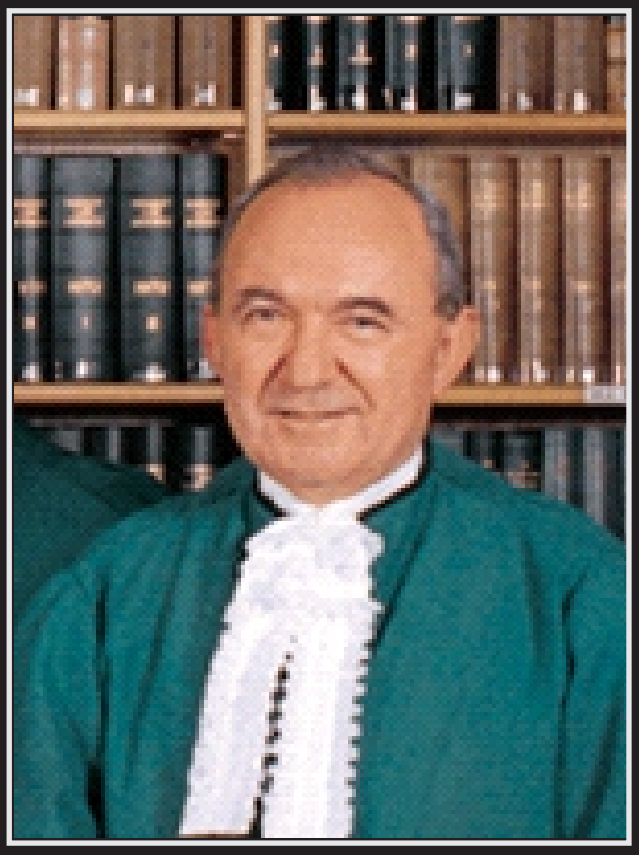


A Tribute to late Justice Antonin Scalia



Prof. Sir John H. Baker QC., LLD(Cantab.), FBA
On the History of the Laws of England.



Hon. Richard Goldstone
on the South African Constitution and
International Law.

Special Report -
On the Doctrine of Duty of Care

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EDITORIAL

Anyone interested in the Laws of England, must first read the Commentaries on the Laws of England an influential four volume treatise authored by Sir William Blackstone. It has long been considered as being a leading authoritative work on the development of English Law. The English legal system had heavily relied on precedent than what statute had provided. The works of Blackstone heavily influenced the American legal system as well. The Supreme Court Judges have quoted his works whenever there arose a historical discussion on a legal issue. We had the honor of interviewing **Professor Emeritus Sir John Baker, QC LLD Cantab FBA**, and the Editor of the *Oxford History of Laws of England*. He had provided an overview of historical research of his seminal work on the History of the Laws of England. This would be of immense benefit to any one serious about delving deep into the contours of how the common law was developed over the centuries.

We have also had the honor of interviewing **Hon. Richard Goldstone**, a former Justice of the South African Constitutional Court and former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He had given a very wide perspective on his role as judge during apartheid era in South Africa, development of post-crisis South African Constitution and the constitutionalism. He has also articulated his position on the state responsibility of upholding the principle of 'universal jurisdiction'.

We have included a special report on the doctrine of the 'Duty of Care' which originated from the celebrated case *Donaghue v Stevenson*. The doctrine has outlived its utility as the society is now heavily influenced by the dictates of technology hence the doctrine must be looked at afresh. The Report calls into question its efficacy and recommends legislation to protect the society from acts of negligence by the public authorities.

Late **Justice Antonin Scalia** has been an outstanding Justice in the annals of the U.S. Supreme Court. He had authored several scholarly works on the interpretation of the law. We thought of paying a tribute to late Justice by reproducing one of his dissenting opinions in *Morrison v Olsen*.

Srinath Fernando,
LLM (UK), LLM (Colombo)
Editor-In-Chief / Publisher

The Anglo-American LAWYER MAGAZINE

Srinath Fernando, LLM UK, LLM Colombo
Editor-In-Chief/ Publisher
The Anglo-American Lawyer Magazine is a publication of the Srinath Fernando Diplomacy
Contact
Srinath Fernando Diplomacy, No. 7/1, 4th Lane, Rawathawatta, Moratuwa, Sri Lanka
Tel 00 94 72 0622 482 / 00 94 11 2648272 Email; theangloamericanlawyer@gmail.com

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INTERVIEW - Hon. Richard Goldstone on Law, Justice and South African Constitutionalism

Former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda From July 1994 to October 2003 Richard J. Goldstone was a Justice of the Constitutional Court of South Africa. He is presently the William Hughes Mulligan Professor of International Law at Fordham School. During the spring semester of 2007 he was the Jeremiah Smith, Jr. Visiting Professor of Law at Harvard Law School. From 15 August 1994 to September 1996 he served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He is presently the co-chairperson of the Human Rights Institute of the International Bar Association. From 1999 to 2003 he served as a member of the International Group of Advisers of the International Committee of the Red Cross. He is a member of the committee, chaired by Paul A Volcker, appointed by the Secretary-General of the United Nations to investigate allegations regarding the Iraq Oil for Food Program.

His most recent appointment is to chair a UN Committee to advise the United Nations on appropriate steps to preserve of the legacy of the ICTY and ICTR. He is an Honorary Bencher of the Inner Temple, London, an Honorary Fellow of St Johns College, Cambridge, and an Honorary Member of the Association of the Bar of New York. He is a Foreign Member of the American Academy of Arts and Sciences. He serves on a number of boards, including the Human Rights Institute of South Africa, Human Rights Watch, Physicians for Human Rights, the International Center for Transitional Justice and the Center for Economic and Social Rights. He is the author of For Humanity: Reflections of a War Crimes Investigator, (2001) Yale University Press.

The AAL Magazine: Honorable Sir, We are truly honored by your consent to have an opportunity to interview you. You have had a very eminent judicial career spanning several decades. It is also a very rare pleasure of having reached the highest level of Judiciary in South Africa by becoming a Justice of the Constitutional Court of South Africa and then your expertise was demanded by the International Criminal Tribunals for the former Yugoslavia and Rwanda. You have also chaired a number of UN Special Commissions. You also held the high position of being the Chancellor of the University of Witwatersrand. You became the Prosecutor and were thrown in to global lime light. Could you tell Sir, how you began your journey - first by becoming a lawyer and then reaching top echelons of the South African Judiciary and then reached the International Criminal Tribunals for the former Yugoslavia and Rwanda. What

exactly drove your success as a Jurist of international repute?

Hon. Richard Goldstone; Thank you for inviting me to be interviewed for your distinguished publication. I began my legal journey as a law student at the University of the Witwatersrand. During the Apartheid era that university was one of only two universities in South Africa that admitted black students. Meeting and befriending black peers as fellow South Africans taught me at first hand the evils and cruelties of the Apartheid system. Black students had no choice but to live in ill-resourced black townships. Many did not have electric power. I lived in a privileged upper middle class suburb with all modern amenities. I became a student leader and became involved in the anti-apartheid movement. When I joined the bar (we have a hybrid systems of advocates or barristers and attorneys), I developed a commercial practice. When I was 40 years of age I was offered a permanent position on the the Transvaal High Court (as it was then called). It was a difficult moral question whether to accept an appointment to the Apartheid judiciary. Other anti-apartheid jurists had done so and were upholding the common law rights of victims of Apartheid. Not without misgivings, I accepted the appointment. I found important loopholes in Apartheid legislation and, as an illustration, issued a judgment that effectively brought an end to the system of segregated housing in the country. Because of the international pressures on the Apartheid government, decisions such as these were not reversed by legislation. As Apartheid came to an end in the early 1990s with the release from prison of Nelson Mandela and other freedom fighters, I was appointed to chair a judicial commission of inquiry into the causes of political violence that accompanied the transition from Apartheid to democracy. It was threatening to email the negotiation process. The Commission held over 40 hearings and was able to establish that much of the violence was the result of what Mandela called a "third force" - elements in the Apartheid police and army that were instigating violence in order to prevent the transition. The new democratic Constitution provided for a new apex court - the Constitutional Court of South Africa. I was appointed by President Mandela as one of the first eleven justices of that court. The Security Council of the United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May of 1993. The statute of the court provides for the chief prosecutor to be appointed by the Security Council on the nomination of the Secretary-General. In September 1993, the fifteen judges were appointed. However, between September 1993 and June 1994, no less than eight nominees of the Secretary-General for the Chief Prosecutor were rejected by the Security Council. Five of them were vetoed by the Russian Federation. It was suggested to the Secretary-General that a South African nominee, supported by President Mandela, was likely to win the approval of the Security Council. That is how I came to be appointed as the first Chief Prosecutor of the ICTY. I had little knowledge of the states of the former Yugoslavia and not much more about International Humanitarian Law. So, it was a steep

learning curve for me. This was the first truly independent international criminal court (Nuremberg was a court appointed by the four victor nations at the end of the Second World War). I remained in The Hague for a little over two years and then returned home to join the bench of the Constitutional Court. I remained involved with international legal issues and, in 1999/2000, chaired the international inquiry into the NATO military attack on Serbia that was intended to protect the Albanian population of Kosovo. We found that the use of military force was illegal but morally justified. More recently, I chaired the Independent Expert Review that was established by Assembly of States Parties of the International Criminal Court to review the Court and the Rome Statute system. We reported in September 2020. Many of our recommendations have been implemented. The Review Mechanism that was appointed by the Assembly of States Parties to consider the recommendations of the Review Committee is still at work.

The short answer to the last part of your question is that any success that I achieved in the international arena was the consequence of my actual and perceived independence and the outstanding people with whom I was privileged to work.

The AAL Magazine: Sir, the mandate of our Magazine is to promote Anglo-American legal heritage. South Africa had been a British colony for over a century, and many principles of English law are still recognized and applied in South Africa. Though Roman Dutch law has a dominant influence over South African law, what is the level of acceptance and influence of English Law in South Africa? Where do you find Roman Dutch law is more influential than English Law. I know by now most of the principles either English law or Roman Dutch law may have been codified by legislation.

Hon. Richard Goldstone: Roman Dutch law was introduced as the common law of South Africa during the Dutch rule over the Cape Colony from 1652 to 1806 when it became a British Colony. As was the case with Sri Lanka, Roman Dutch law continued to be the common law even during British rule. English criminal and commercial law was introduced but Roman Dutch law continued to influence what was regarded as the common law. As you correctly state, legislation has codified the law in most areas. An interesting illustration of the application of Roman Dutch law is provided by the 1991 case of Ebrahim, who was a member of the banned African National Congress, and then resident in neighbouring Swaziland (now called Eswatini). Ebrahim was abducted by members of the South African Police and put on trial for alleged terrorism. The Supreme Court of Appeal, relying on Roman Dutch law, held that state sponsored abduction from a foreign state did not confer jurisdiction on a South African Court and Ebrahim was set free. The court expressly did not follow Anglo-American law that precludes a court from investigating how an accused person comes before it.

The AAL Magazine: As you know Sir Since 1994, South Africa has undergone a remarkable transition to democracy, initially under the 'interim' Constitution of 1993 and subsequently under the 'final'

Constitution of 1996. As someone who had held high office in the South African Judiciary how do you see this transition in terms of the development of constitutional and public law? Which areas do you feel have undergone marked changes? Where do you find some short comings in the South African legal system? Do you really see progress of South Africa despite the fact that there is a Constitution that has had legitimacy and acceptance from all races of South Africa? If someone were to say that People of South Africa have not as yet seen or felt much progress in terms of eliminating poverty though South African is known as a sunshine country. There are very large industries and there is a thriving export markets for South African products and natural resources. Would you attribute this to an absence of political will on the part of rulers or are there still constitutional and administrative structural issues and existential problems that beset the Government of South Africa - or is it owing to the inequality in the distribution of wealth and resources of the nation.

Hon. Richard Goldstone: The Constitutions of 1993 and 1996 introduced an abrupt change from the autocratic and racist system that governed South Africa from its colonial times until it achieved democratic rule in 1994. The Constitution became the supreme law of the land and with it, the rule of law and equality. Most of the Apartheid laws had been repealed prior to the 1993 Interim Constitution coming into operation. However, racist laws remained on the statute book and they were held to be unlawful in successive decisions of the Constitutional Court. The first case that came before the court related to the constitutionality of the death penalty. The court unanimously held that capital punishment was inconsistent with the provisions of the bill of rights and hence unconstitutional. The 1996 Constitution also introduced justiciable social and economic rights. That was a radical change and the courts have recognised justiciable rights to health, housing and education. Those rights are expressly subject to the financial ability of the government to progressively provide them but that notwithstanding there has been the recognition and enforceability of some of those rights.

The major shortcomings with regard to post-Apartheid South Africa, in my opinion, results from insufficient political will on the part of government to proactively use the Constitution to reduce the inequality in what remains one the most unequal societies in the world. The prime example relates to the ownership of land. Until 1994 the law enabled the white minority to own 87% of the land in South Africa. The legislation that enabled that grossly inequitable system was repealed at the outset of the democratic dispensation. Yet, the government failed to introduce policies that were efficiently directed at the readjustment and reallocation of land. Unfortunately, too, politicians blamed the property provisions of the Constitution to explain their inaction. There is presently much debate as to whether the Constitution requires amendment to facilitate those changes. In my view, it has been the politics and not the law that has been wanting.

In short, constitutional rights are of fundamental importance. But they can only bring relief to the poor and marginalised if the government of the day has the political will to enable those rights to be realised.

The AAL Magazine: We are under the impression that the 1996 Constitution received legitimacy and acceptance because it was meant to eliminate the apartheid time discrimination and racial laws. Has the Constitution succeeded in eliminating the discrimination associated with the apartheid era?

Hon. Richard Goldstone: The 1996 Constitution was indeed intended to be a bridge leading from Apartheid to democracy and equality. Its extensive and progressive bill of rights enshrines the rule of law including racial and gender equality. It has certainly eliminated the racial oppression and segregation that epitomised the Apartheid era. It is difficult for my grandchildren to imagine the South Africa in which I grew up. Discrimination between racial groups has been eliminated and gender equality, although not fully achieved, is incomparably more advanced than during the Apartheid era. The Constitution, however, has not been successful in eliminating the inequality of wealth between the majority black population and the minority white population. The levers of economic power remain predominantly, but no longer entirely, in the hands of white South Africans. Since the end of Apartheid a substantial black middle class and upper middle class has come into being. Those at the bottom of the economic pyramid still suffer in a country that has an unemployment rate of about 40%. This economic reality was exacerbated by the Covid19 pandemic. Fortunately, South Africa is not dependent on imports for staple foods. Yet the rising rate of inflation spurred by the war presently being waged by Russia on Ukraine is another factor adding to the plight of the poor. These problems are certainly not the consequence of the Constitution. Yet, at the same time, the Constitution is unable to rescue the situation. The answer lies in good governance and the elimination of the corruption which has, during the past decade, ravaged public funds. On the bright side, the degradation and oppression that characterised the Apartheid era has all but disappeared.

The AAL Magazine: There have been progressive dicta by the Constitutional Court holding that administrators must recognize international conventions such as UDHR whenever they are relevant to the functions of an administrative authority. One classic case is ***State v Makwanyane***. What is the extent of the clash between municipal law and international law in South Africa, and is it an impediment to the achievement of justice? Are there still lacunas in the municipal law of South African where vital international conventions have not been ratified by the Parliament of South Africa?

Hon. Richard Goldstone: The Constitution commands that when interpreting the bill of rights, international law must be considered; and in interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with

international law. In the *Makwanyane* Case, to which you refer, the Constitutional Court held that international law includes not only laws by which South Africa is bound, but also other international law such as the European Convention on Human Rights. South Africa has ratified all of the UN and African Union conventions of human rights as well as the Rome Statute of the International Criminal Court (ICC). I shall revert to the latter with regard to the case of President Al Bashir. The Constitution also recognises customary international law as the law of South Africa. To respond directly to your question, I am not aware of any formal clash between municipal law and international law in South Africa.

The AAL Magazine: You had the privilege of being the Chancellor of the University of Witwatersrand. How do you value the South African educational standards compared to the other parts of the African continent. I understand South Africa has a very high number of students from the other countries especially from the African continent. Does it not reflect the fact that South Africa has been able to maintain high standards in education? To what do you attribute this phenomenon?

Hon. Richard Goldstone: The standard of education in South Africa is indeed high in comparison to other countries on our African continent. During the Apartheid era that was true only of education for white South Africans. The education provided to the vast majority of our young people was grossly inferior and under-funded. This changed with the advent of democracy in 1994 and successive administrations have devoted equal funding for the education of all South Africans. The bill of rights provides that everyone has the right to basic education and, depending on available funding, to the progressive right to further education. In the poorer rural areas, basic education remains under-resourced and is inferior to that provided in the urban areas. All South African universities are open to all and there is extensive scholarship funding provided by the public and private sectors. As in many developing countries, those students who come from the lower income groups suffer from inadequate provision for accommodation, food and books. This is very much a work in progress. The University of South Africa offers remote (correspondence) higher education degree courses and enrols annually some tens of thousands of students from around our continent. The regular universities also enroll many foreign students. The high standard of education provided to white South Africans during the Apartheid system is now available to all students.

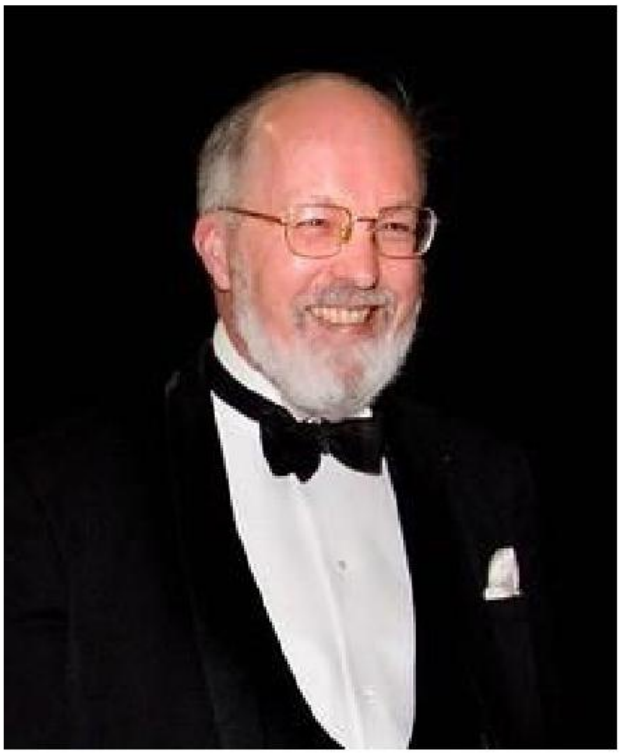
The AAL Magazine: If I may take you into human rights law, you may recall Sir, there has been a controversy surrounding the issue involving the former President of Sudan, Omar Al-Bashir's visit to South Africa for the African Union Summit. He had been invited by the South African Government in defiance of the arrest warrants by the International Criminal Court which had been issued over the alleged War Crimes and Genocide in Darfur. Do you think there has been a serious dereliction by the South African Government by inviting him in the first place and according him VVIP space, and then let him leave the country whilst a court

warrant was being contemplated. Could you please explain what really went behind and the position of the international law in this regard in terms of what South African Government ought to have done and on the responsibility of the nation states on recognizing the 'Universal Jurisdiction Principle' in general?

Hon. Richard Goldstone: The case of Al-Bashir case was most unfortunate. The arrest warrant against the then president of Sudan was issued by the ICC pursuant to the referral of the Sudan situation to the ICC. That referral was made pursuant to e resolution of the Security Council under Chapter VII of the UN Charter: it was thus binding on all UN member states. In addition, as mentioned earlier, South Africa has ratified the Rome Treaty. Our courts held that the South African authorities were legally obliged to arrest Al-Bashir at the time he was visiting South Africa in order to attend the African Union Summit. Soon after the High Court ordered that Al-Bashir was not allowed to leave the country before the court ruled on the execution of the arrest warrant, the government hastily bundled him out of the country.

The Al-Bashir visit to South Africa took place at the height of the African Union campaign against the ICC. Indeed, the AU instructed each of its members who were parties of the Rome Statute to withdraw their ratification. Fortunately for international criminal justice, only one member of the AU did so - Burundi. South Africa's initial attempts to do so were frustrated by the courts (for technical procedural reasons) and then by the changing politics after the end of the Zuma Administration in 2018. The unjustified allegation that the ICC was biased against African states has receded and especially so since the ICC has become involved in non-African situations.

INTERVIEW - Prof. Sir John H. Baker Q.C., LL.D. (Cantab.), F.B.A., On the History of the Laws of England.



Prof Sir Baker was educated at University College London (LLB 1965, PhD 1968). He was called to the bar by the Inner Temple (1966) and taught law at University College London (1965-70) and Cambridge University (1970-2011). He was appointed Professor of English Legal History, Cambridge (1988-98), Downing Professor of the Laws of England (1998-2011), Fellow of St Catharine's College, Cambridge (1971-) and University College London (1991-); LLD, Cambridge (1984); Fellow of the British Academy (1984) and Honorary Foreign Member of the American Academy (2001); Honorary LLD, Chicago (1992); Honorary Bencher of the Inner Temple and Gray's Inn; Queen's Counsel honoris causa (1996); knighted for services to legal history (2003); Literary Director of the Selden Society (1981-2011); author of *An Introduction to English Legal History* (1971; 5th edition, 2019), *The Reinvention of Magna Carta 1216-1616* (2017); *English Law under Two Elizabeths* (2021), and numerous other books and papers.

The AAL Magazine: What a great pleasure and honor it is to interview such a distinguished Downing Professor Emeritus of the Laws of England at the University of Cambridge where you have excelled in research on the History of Laws of England. Professor, I have had the benefit of reading your profile which gives details of a serious of books and volumes you have published. I think your contribution to the history of the Laws of England is so immense and I really could not understand the amount of time you must have invested in gleaning all the information produced therein. You have delved deep into the history of England the development of law in such a background where searching historical materials are extremely difficult and it is indeed a huge exercise in research. You have been amply rewarded with a number of high academic credentials and honorary doctorates by Universities in recognition and in honor of the research you had undertaken. If I may begin this interview, could you explain to us as to what this 'Downing Professor' denotes?

Prof. Baker: It is the name of the first chair of English law established in the University of Cambridge. It was originally part of the foundation of Downing College, named after Sir George Downing (d. 1749).

The AAL Magazine: It is not clear as to what constitute the 'Laws of England' and

the 'English Common Law'. Of course Common Law is the Judge made law, my issue is whether there could be some elements of judge made law having been codified and the Laws of England having been introduced by the Parliament. Could there be some intermingling of both. Judge made law could not possibly have been derived without reference to the political and social setting at the time the Judge expounded the law unlike in the U.S where the law is expounded with reference to what framers had in mind at the time the constitution was drafted. Would you elaborate on the research that you have undertaken especially in the context of the social settings.

Prof. Baker: As you say, the laws of England consist of both statute law and unwritten common law. The position is similar in the United States, save that the Supreme Court has assumed the power to strike down legislation which it considers to infringe the written constitution. Exercising that judicial power to review legislation creates a different kind of judge-made law, though I think it is a matter of controversy whether it should be tied to the original intent or whether it can evolve like the common law. If they followed the original intent, they would still have slavery. In the United Kingdom we do not have a written constitution and therefore Parliament is supreme. Acts of a legislature obviously respond directly to social changes and political pressures. But the relationship between the common law and social change is more complex than one might think. The common law does have to adapt as the world changes, but the judges cannot simply overturn long-standing principles derived from centuries of argument and reasoned thinking. It is therefore a slower process, moving step by step from an agreed starting point – and it may sometimes be so gradual that Parliament feels it necessary to take over. One thing the judges are not free to do is to impose taxation, and this means that they cannot by developing the common law bring about the kind of social reforms which require monetary expenditure or which require the balancing of interests which are not represented before them in particular litigation. Even setting up enquiries to consider reforms costs money.

The AAL Magazine: If I may ask you Professor, you have started the Volume I from the Canon Law and Ecclesiastical Jurisdiction from the fifth century to sixteenth century. I would say it is a fairly long period - almost a millennium. Would you expatiate upon on the nature of research that must have influenced this volume? England was governed by Roman Empire up until fourth Century surely there must have been some sort of a clash of Papal influence of Roman law and the adopting of Latin legal maxims. The first volume also covered the period between the emergence of Protestant movement in England and Europe ending Sixteenth Century.

Prof. Baker: the Oxford History of the Laws of England is a series of volumes written by different authors. I am the general editor but have only written one of the volumes myself – Volume VI (1483-1558). Volume I was written by Professor Helmholz. But I can respond to your question by saying that the Christian Church probably did not reach England until after the Romans had left.

There was therefore no Roman law operating in England which could have influenced the law of the Church when it was received here. That influence came through the universities, starting with Bologna, where doctors trained in Roman law reduced the rules and regulations of the Church into some kind of system. I don't think this could be called a clash – the two systems of law went hand in hand. If there was a clash it was with the English common law, which was developed by lawyers practising in the king's courts. Until the nineteenth century those lawyers belonged to a completely separate profession from the doctors of law who practised in the Church courts.

The AAL Magazine: Was there a social phenomenon that changed the style of governance and enactment of laws which were pro Roman Government and the defiance of Roman law under Protestant movement after the 15th Century. Was there any deliberate move to defy the Roman laws enacted during Roman influence in England?

Prof. Baker: As I said in my last answer, the Roman law did not operate in England after the Romans left – which was many centuries before the common law came into being. I think your question relates more to the law of the Church. In England, the Church's jurisdiction was primarily concerned with marriage, wills, intestate succession to movables, and the punishment of lesser sins. Land law, contract, tort, and the punishment of more serious crimes belonged to the king's courts of common law. The break with Rome in the sixteenth century had virtually no effect on the jurisdiction of the Church courts, since the law of marriage, wills and succession remained the same. It was more about theology, and whether it was right to burn people alive for failing to believe in the theories of theologians.

The AAL Magazine: Your Co-Editor John Hudson, has delved into translations and quotes extensively from the original sources which were previously only available in Latin, Old English and Old French, and he has opened the source for a wider range of readers. Professor, how were these sources referred to and where were you able to source them. I know England has a corpus of literature from the early times and they are well preserved by the Archivists. The Church of England Archives Oxford University Archives are yet another source of ancient archival repositories. Would you advise as to how these sources were accessed to as I feel a future researcher might find it interesting. Where do you consider being the place from which you got 'a wealth of information'? To which library do you attribute being the greatest repository of the English law history?

Prof. Baker: As I indicated in a previous answer, John Hudson was the author of the second volume in the Oxford series, not a co-editor. He had to use a wide range of original sources, because much of his period predated the keeping of records by courts. For the later periods on which I have written myself, we have a continuous record – written in Latin on parchment – of every case heard in the central royal courts from

the 1190s onwards, and an increasing range of records of cases heard in other courts, not to mention a professional literature and more plentiful extra-legal sources. The Church itself has few if any records of this kind – indeed, the Church of England as such does not have a relevant archive. The principal records are in the Public Record Office at Kew (near London), and most of the court-records which are kept there can now be read in digital photographs – at any rate, by those who can read abbreviated Latin written in 'court hand' – via the website called Anglo-American Legal Tradition (http://aalt.law.uh.edu/). This is a resource of immense value, created by the energy and dedication of Professor Robert Palmer of the University of Texas at Austin and a team of helpers. Besides the records kept by courts, there are the law reports and other materials written by lawyers. These have survived in libraries all over the world. The largest collection of legal manuscripts (other than records) is in the British Library, London, followed by Cambridge University Library and the Harvard Law School. Many important texts, including medieval and early-modern law reports, have been edited by the Selden Society, with parallel English translations of the Law French and Latin. Printed law books from the fifteenth century onwards can be read via the website Early English Books Online. But the full range of available material is very large, including for later periods treatises, lectures, opinions of counsel, lawyers' correspondence, family muniments, and so on. We can also sometimes derive insights from lay literature and polemical tracts.

The AAL Magazine: We would like to know how the English law has evolved over a long period time and what were the core elements of English law, that was subjected to change over such a long period of time. Was it the rationality and reasoning on which the British judicial system was grounded or could there be any other reason which you have discovered during your research.

Prof. Baker: That is rather a large question to answer in a nutshell, though I have suggested the outlines of an answer already. Statutes come from Parliament after political debate and, being written, lack the flexibility of the common law. The judges cannot rewrite statutes to make them more sensible or rational, but they do have to interpret them and their decisions as to what statutes mean form a kind of case-law which is different from the common law. The development of the common law itself is quite different, since it takes place over the long term as a result of argument in court by lawyers putting opposing points of view, and reasoned responses to those arguments by judges and appellate courts. Every new step has to be justified in terms of previous reasoning, though it is sometimes possible to correct what seem to be errors in previous conclusions or to introduce countervailing reasons which were not considered in previous cases. In many respects the methodology of the common law is superior to that of parliamentary statutes, though the latter necessarily take precedence and can extinguish common law. Legislation is necessary to bring about changes which courts are not permitted to bring about,

especially those which require public funds to be made available. Nowadays we live in a regulatory state and so most of the law is contained in statutes and statutory instruments, though most of it is quite unknown to ordinary persons (or even to lawyers) and does not directly concern them. In late medieval times, most of the law was common law, found not only in reported cases but also in the teaching of the inns of court. The earliest statutes were brief and broadly worded and also had to be expounded by courts and in the inns of court. However, the development of the common law by reasoning from case to case has followed much the same pattern over a great many centuries. What has changed is not so much the fundamental character of the common law as the world on which it operates.

The AAL Magazine: Professor, I would be curious to know how Normans, who spoke French, had enjoyed customary law in Normandy, there does not seem to exist any evidence of any professional lawyers or judges or any judicial system existed in Normandy. The clergy was hugely influenced by the Roman law and the Canon Law of the Christian Church. How was the reception of Norman influence in developing the English law? What impact did it have on the development of English law principles? Do you think this is a new area for further research?

Prof. Baker: How far the Norman 'conquest' of England in 1066 altered English law was a topic of heated controversy in the time of Elizabeth I and it is still being argued about in the time of Elizabeth II. The Normans themselves were keen to emphasise legal continuity from before 1066, since they claimed England by right rather than by conquest; but they did in fact introduce significant changes in the patterns of landholding. Their innovations were not a matter of transplanting jurisprudence but a reflection of military feudalism, which was to some extent a form of social organisation imposed from above. But they had to be blended with what was there before. You are right that there were no professional lawyers in Normandy in 1066, any more than there were in England. And there were variable customs rather than a body of law like the common law. We usually consider the common law to have come into being during the twelfth century, not as a direct result of the Norman invasion but as a result of the strengthening of central institutions. You cannot have a 'common' law – that is, a law common to the whole country, until you have a legislature and a legal system exercising a uniform authority over the whole country. There is much valuable research already being done on these questions – for instance, in addition to Professor Hudson's book in the Oxford series, the work of Professor George Garnett. As to French, it was used by English lawyers (in a gradually declining dialect known as Law French) until the seventeenth century; but it was not the French of the Normans. It seems to have been adopted in the early days of the common law for argument in court, not in deference to the Normans but because it was a more standardised language than the English dialects of that time and more readily transposed into the Latin of the records.

The AAL Magazine: Professor according to the history of the Inns of Court, they seem to have begun professional training after 15th century. The oldest one among the four is Inner Temple which has a history stems from 12th century onwards. The King's Inn - which still operates in the Republic of Ireland - had commenced its operations during the 15th century when Ireland was under British Dominion. Would you please elaborate on the standards of legal training at the time English justice system evoked from the history?

Prof. Baker: I think the Inns of Court began in the mid-fourteenth century and there is evidence that they had educational functions more or less from the beginning. Although I am a bencher of the Inner Temple, I could not in honesty support a suggestion that it was older than the others. The Inns certainly did not exist in the twelfth century. The Temple existed then, but it was the home of the Knights Templar, not of lawyers. We still have the ancient Temple Church, part of which was consecrated by the Patriarch of Jerusalem in 1185, on whose floor lie stone effigies of knights – including William Marshal, one of the instigators of Magna Carta. But the lawyers came after the order of knights had been dissolved and their possessions given to the Knights Hospitaller of St John, who did not need the Temple for their own use. Before 1400 each of the four Inns of Court – supported by ten or so lesser inns for younger students – had developed an educational regime based on that of the universities, with lectures (given on statutory texts) and disputations or moots. That system collapsed in the seventeenth century, but it has since been replaced by a modern equivalent. A significant change in legal education occurred in the nineteenth century, when the universities of Cambridge and Oxford – which had always taught Roman law – and also the newer universities began to teach and give degrees in English law. Intending lawyers could then learn the basic principles of English law at university and move on to the more practical aspects of the law after graduation.

The AAL Magazine: Professor, why there is a separate body of Poor Laws developed in England. Why was it required to focus on Poor Law when Britain was relatively a wealthy nation by 15th Century? There may have been a temporary setback but why was it made known as Poor Law.

Prof. Baker: We now call it social security, and the root premise is that some people are not sufficiently fortunate to be able to earn their living by their own efforts or to be supported within a family. How to deal with this problem has been a matter of debate and the subject of various legislative solutions from the sixteenth century to the present. It was not a matter for the common law, because it required the taxation of those who were more fortunate in order to support those unable to work, and this was originally managed at a local level of government – the parish (usually corresponding to a village, or part of a town). The main difficulty, in the sixteenth century as now, was how to make a fair distinction between those who were genuinely incapable of working and those who were simply idle. That calls for political decisions and actions rather than legal reasoning, and I suppose that is why legal

historians have not paid it as much attention as perhaps it deserves.

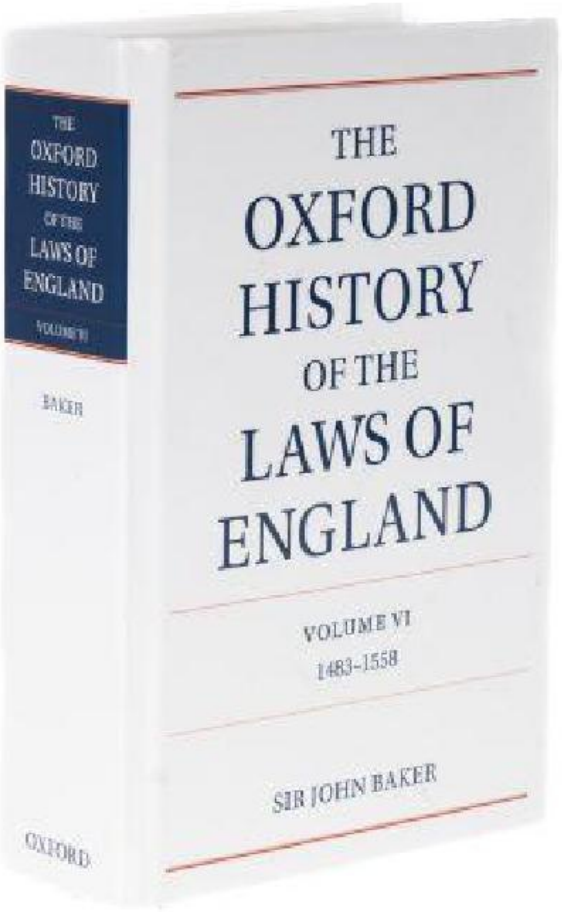
The AAL Magazine: Sir Mathew Hale says legislation of 1598 and 1601 was passed at a time when the problem of poverty was unusually severe. There had been a low productivity of harvest and it was the worst of the period. There had been a steady increase of issues involving unemployment and food supplies which had not kept pace with. Professor why did it take such a dramatic turn to refer to these laws as English Poor Laws. What sort of laws are considered poor law and are they still in force.

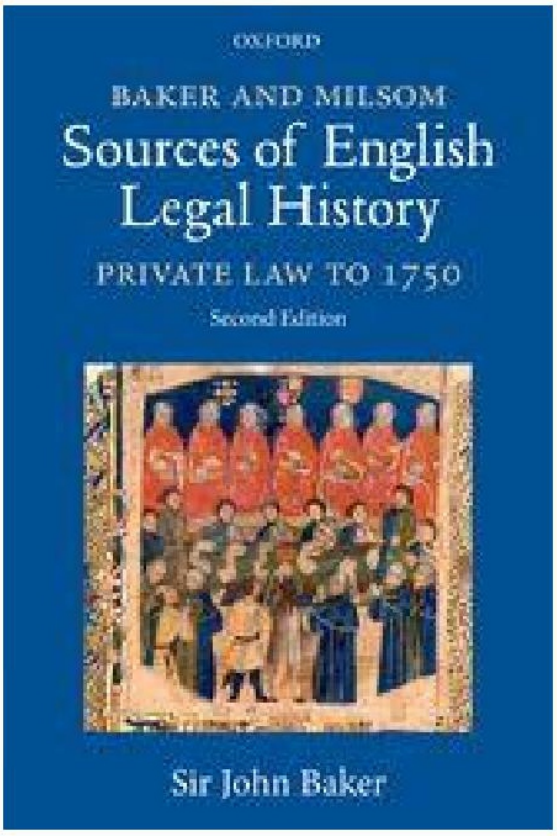
Prof. Baker: I cannot really add to my previous answer. There were poor laws continuously in being from the sixteenth century onwards, but their content was constantly being adapted not only to deal with emergencies such as poor harvests and plagues but also to reflect different theories as to the best remedies for poverty. There was a major overhaul of the poor law in the early nineteenth century with the establishment of 'work-houses', but we now have a more sympathetic approach to social security. As I have indicated, it is not a subject on which I have conducted any research myself.

The AAL Magazine: Professor, prior to your research there have been some research on the History of English Law by Sir William Holdsworth, Sir Frederic Pollock co-authored with Frederic William Maitland, John Hudson, Harold Potter, Mathew Hale, and yet another one by George Crabb etc. How do you compare your extensive volumes published by the Oxford University Press and what sort of new sources you have discovered during this research?

Prof. Baker: As with the common law, so our understanding of English legal history develops gradually from one generation to another as a result of research and debate. We all build upon what went before. Coke, Hale, Selden and other early writers were interested in legal history chiefly because they thought it directly informed the law of their time. History was not an end in itself, and it did not enter the university curriculum until the later nineteenth century. The Selden Society was named after John Selden (d. 1654) with good reason, though most of us now regard the founder of our subject in its present form to have been Maitland – prime mover of the Selden Society in 1887, and Downing Professor of the Laws of England from 1888 to 1906. Holdsworth's massive history is not so much consulted today, and the reason is that it was only practicable for him to write it from published sources. The principal change in English legal history since the death of Holdsworth in 1944 – four months before I was born – is that we have come to appreciate the fundamental importance of materials beyond the printed law reports and statutes. The principal legal historian of the twentieth century is one you did not mention, Professor S. F. C. Milsom (d. 2016), who had more influence on my work than any other. But it is right to mention also Professor A. W. B. Simpson (d. 2011), another pioneer of the use of manuscripts, and there are several others now living whom I will not embarrass. The purpose of the Oxford History of the Laws of England

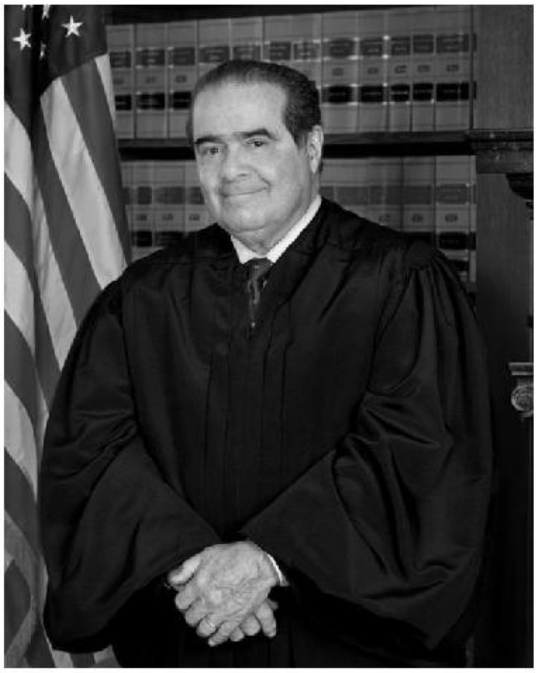
is to provide the same breadth of coverage as Holdsworth while taking account of subsequent research in a wider range of sources. It is proving a lengthy task, though – it is well over thirty years ago since we decided to undertake it, and only about half is finished. Some of the original authors died before writing anything, and others seem to have been overwhelmed by the task. But it will be finished one day.





A TRIBUTE TO LATE JUSTICE ANTONIN SCALIA

Dissenting Opinion of Justice Scalia – In Morrison, Independent Counsel v Olsen et al.



We reproduce here the dissenting opinion delivered by late Justice Antonin Scalia in *Morrison v. Olsen.*

SCALIA J., dissenting. It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of The Federalist, Madison wrote that "[no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." *The Federalist* No. 47, p. 301 (C. Rossiter ed. 1961) (hereinafter *Federalist*). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours. The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article I, § 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article III, § 1, provides that "[the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And the provision at issue here, Art. II, § 1, cl. 1, provides that "[t]he executive Power shall be vested in a President of the United States of America."

But just as the mere words of a Bill of Rights are not self-effectuating, the Framers recognized "[t]he insufficiency of a mere parchment delineation of the boundaries" to achieve the separation of powers. *Federalist* No. 73, p. 442 (A. Hamilton). "[T]he great security," wrote Madison, "against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." *Federalist* No. 51, pp. 321-322. Madison continued: "But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. . . .As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." Id., at 322-323. The major "fortification" provided, of course, was the veto power. But in addition to providing fortification, the Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected. See 1 M. Farrand, *Records of the Federal Convention* of 1787, pp. 66, 71-74, 88, 91-92 (rev. ed. 1966); 2 id., at 335-337, 533, 537, 542. Thus, while "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," U. S. Const., Art. I, § 1 (emphasis added), "[t]he executive Power shall be vested in a President of the United States," Art. II, § 1, cl. 1 (emphasis added). That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish-so that "a gradual concentration of the several powers in the same department," *Federalist* No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

The present case began when the Legislative and Executive Branches became "embroiled in a dispute concerning the scope of the congressional investigatory power," *United States v. House of Representatives of United States*, 556 F. Supp. 150, 152 (DC 1983), which-as is often the case with such inter-branch conflicts -became quite acrimonious. In the course of oversight hearings into the administration of the Superfund by the Environmental Protection Agency (EPA), two Subcommittees of the House of Representatives requested and then

subpoenaed numerous internal EPA documents. The President responded by personally directing the EPA Administrator not to turn over certain of the documents, see Memorandum of November 30, 1982, from President Reagan for the Administrator, Environmental Protection Agency, reprinted in H. R. Rep. No. 99-435, pp. 1166- 1167 (1985), and by having the Attorney General notify the congressional Subcommittees of this assertion of executive privilege, see Letters of November 30, 1982, from Attorney General William French Smith to Hon. John D. Dingell and Hon. Elliott H. Levitas, reprinted, id., at 1168-1177. In his decision to assert executive privilege, the President was counseled by appellee Olson, who was then Assistant Attorney General of the Department of Justice for the Office of Legal Counsel, a post that has traditionally had responsibility for providing legal advice to the President (subject to approval of the Attorney General). The House's response was to pass a resolution citing the EPA Administrator, who had possession of the documents, for contempt. Contempt of Congress is a criminal offense. See 2 U. S. C. § 192.

The United States Attorney, however, a member of the Executive Branch, initially took no steps to prosecute the contempt citation. Instead, the Executive Branch sought the immediate assistance of the Third Branch by filing a civil action asking the District Court to declare that the EPA Administrator had acted lawfully in withholding the documents under a claim of executive privilege. See ibid. The District Court declined (in my view correctly) to get involved in the controversy, and urged the other two branches to try "[compromise and cooperation, rather than confrontation." 556 F. Supp., at 153. After further haggling, the two branches eventually reached an agreement giving the House Subcommittees limited access to the contested documents. Congress did not, however, leave things there. Certain Members of the House remained angered by the confrontation, particularly by the role played by the Department of Justice. Specifically, the Judiciary Committee remained disturbed by the possibility that the Department had persuaded the President to assert executive privilege despite reservations by the

EPA; that the Department had "deliberately and unnecessarily precipitated a constitutional confrontation with Congress"; that the Department had not properly reviewed and selected the documents as to which executive privilege was asserted; that the Department had directed the United States Attorney not to present the contempt certification involving the EPA Administrator to a grand jury for prosecution; that the Department had made the decision to sue the House of Representatives; and that the Department had not adequately advised and represented the President, the EPA, and the EPA Administrator. H. R. Rep. No. 99-435, p. 3 (1985) (describing unresolved "questions" that were the basis of the Judiciary Committee's investigation). Accordingly, staff counsel of the House Judiciary Committee were commissioned (apparently without the knowledge of many of the Committee's members, see id., at 731) to investigate the Justice Department's role in the controversy. That investigation lasted 2

years, and produced a 3,000-page report issued by the Committee over the vigorous dissent of all but one of its minority-party members. That report, which among other charges questioned the truthfulness of certain statements made by Assistant Attorney General Olson during testimony in front of the Committee during the early stages of its investigation, was sent to the Attorney General along with a formal request that he appoint an independent counsel to investigate Mr. Olson and others.

As a general matter, the Act before us here requires the Attorney General to apply for the appointment of an independent counsel within 90 days after receiving a request to do so, unless he determines within that period that "there are no reasonable grounds to believe that further investigation or prosecution is warranted." 28 U. S. C. §592(b)(1). As a practical matter, it would be surprising if the Attorney General had any choice (assuming this statute is constitutional) but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional request, Mr. Olson. Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial. How could it not be, the public would ask, that a 3,000-page indictment drawn by our representatives over 2 years does not even establish "reasonable grounds to believe" that further investigation or prosecution is warranted with respect to at least the principal alleged culprit? But the Act establishes more than just practical compulsion. Although the Court's opinion asserts that the Attorney General had "no duty to comply with the [congressional] request," ante, at 694, that is not entirely accurate. He had a duty to comply unless he could conclude that there were "no reasonable grounds to believe," not that prosecution was warranted, but merely that "further investigation" was warranted, 28 U. S. C. §592(b)(1) (1982 ed., Supp. V) (emphasis added), after a 90-day investigation in which he was prohibited from using such routine investigative techniques as grand juries, plea bargaining, grants of immunity, or even subpoenas, see § 592(a)(2). The Court also makes much of the fact that "the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, § 592(f)." Ante, at 695. Yes, but Congress is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment. Where, as here, a request for appointment of an independent counsel has come from the Judiciary Committee of either House of Congress, the Attorney General must, if he decides not to seek appointment, explain to that Committee why. See also 28 U. S. C. § 595(c) (1982 ed., Supp. V) (independent counsel must report to the House of Representatives information "that may constitute grounds for an impeachment").

Thus, by the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch. Mr. Olson may or may not be guilty of a crime; we do not know. But we do know that the

investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are no reasonable grounds to believe that further investigation is warranted. The decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the President and his subordinates.

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning. The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. As my prologue suggests, I think that has it backwards. Our opinions are full of the recognition that it is the principle of separation of powers, and the inseparable corollary that each department's "defense must ... be made commensurate to the danger of attack," *Federalist No.* 51, p. 322 (J. Madison), which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power. Thus, while I will subsequently discuss why our appointments and removal jurisprudence does not support today's holding, I begin with a consideration of the fountainhead of that jurisprudence, the separation and equilibration of powers.

First, however, I think it well to call to mind an important and unusual premise that underlies our deliberations, a premise not expressly contradicted by the Court's opinion, but in my view not faithfully observed. It is rare in a case dealing, as this one does, with the constitutionality of a statute passed by the Congress of the United States, not to find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional, see, e. g., *Rostker v. Goldberg*, 453 U. S. 57, 64 (1981); i, 448 U. S. 448, 472 (1980) (opinion of Burger, C. J.); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 102 (1973); *United States v. National Dairy Products Corp.*, 372 U. S. 29, 32 (1963), and that we will decline to apply the statute only if the presumption of constitutionality can be overcome, see Fullilove, supra, at 473; Columbia Broadcasting, supra, at 103. That caution is not recited by the Court in the present case because it does not apply. Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their

respective spheres. But where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.. . ." Federalist No. 49, p. 314. The playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt. To repeat, Article II, § 1, cl. 1, of the Constitution provides: "The executive Power shall be vested in a President of the United States."

As I described at the outset of this opinion, this does not mean some of the executive power, but all of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'," though it qualifies that concession by adding "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." Ante, at 691. The qualifier adds nothing but atmosphere. In what other sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere-if conducted by government at all-been conducted never by the legislature, never by the courts, and always by the executive. There is no possible doubt that the independent counsel's functions fit this description. She is vested with the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General." 28 U. S. C. § 594(a) (1982 ed., Supp. V) (emphasis added). Governmental investigation and prosecution of crimes is a quintessentially executive function. See i, 470 U. S. 821, 832 (1985); *Buckley v. Valeo*, 424 U. S. 1,138 (1976); *United States v. Nixon*, 418 U. S. 683, 693 (1974).

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the

statute. Instead, the Court points out that the President, through his Attorney General, has at least some control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" Presidential control. "Most important" among these controls, the Court asserts, is the Attorney General's "power to remove the counsel for 'good cause.'" Ante, at 696. This is somewhat like referring to shackles as an effective means of locomotion. As we recognized in *Humphrey's Executor v. United States*, 295 U. S. 602 (1935)- indeed, what Humphrey's Executor was all about-limiting removal power to "good cause" is an impediment to, not an effective grant of, Presidential control. We said that limitation was necessary with respect to members of the Federal Trade Commission, which we found to be "an agency of the legislative and judicial departments," and "wholly disconnected from the executive department," id., at 630, because "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." Id., at 629. What we in Humphrey's Executor found to be a means of eliminating Presidential control, the Court today considers the "most important" means of assuring Presidential control. Congress, of course, operated under no such illusion when it enacted this statute, describing the "good cause" limitation as "protecting the independent counsel's ability to act independently of the President's direct control" since it permits removal only for "misconduct." H. R. Conf. Rep. 100-452, p. 37 (1987).

Moving on to the presumably "less important" controls that the President retains, the Court notes that no independent counsel may be appointed without a specific request from the Attorney General. As I have discussed above, the condition that renders such a request mandatory (inability to find "no reasonable grounds to believe" that further investigation is warranted) is so insubstantial that the Attorney General's discretion is severely confined. And once the referral is made, it is for the Special Division to determine the scope and duration of the investigation. See 28 U. S. C. § 593(b) (1982 ed., Supp. V). And in any event, the limited power over referral is irrelevant to the question whether, once appointed, the independent counsel exercises executive power free from the President's control. Finally, the Court points out that the Act directs the independent counsel to abide by general Justice Department policy, except when not "possible." See 28 U. S. C. §594(f) (1982 ed., Supp. V). The exception alone shows this to be an empty promise. Even without that, however, one would be hard put to come up with many investigative or prosecutorial "policies" (other than those imposed by the Constitution or by Congress through law) that are absolute. Almost all investigative and prosecutorial decisions - including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted- involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered, as exemplified by the recent decision of an independent counsel to subpoena the former Ambassador

of Canada, producing considerable tension in our relations with that country. See N. Y. *Times*, May 29, 1987, p. A12, col. 1. Another preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. The Justice Department and our intelligence agencies are often in disagreement on this point, and the Justice Department does not always win. The present Act even goes so far as specifically to take the resolution of that dispute away from the President and give it to the independent counsel. 28 U. S. C. § 594(a)(6) (1982 ed., Supp. V). In sum, the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely "some" Presidential control.

As I have said, however, it is ultimately irrelevant how much the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." Ante, at 695. It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether "the President's need to control the exercise of [the independent counsel's] discretion is so central to the functioning of the Executive Branch" as to require complete control, ante, at 691 (emphasis added), whether the conferral of his powers upon someone else "sufficiently deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws," ante, at 693 (emphasis added), and whether "the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties," ante, at 696 (emphasis added). It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are.

The utter incompatibility of the Court's approach with our constitutional traditions can be made more clear, perhaps, by applying it to the powers of the other two branches. Is it conceivable that if Congress passed a statute depriving itself of less than full and entire control over some insignificant area of legislation, we would inquire whether the matter was "so central to the functioning of the Legislative Branch" as really to require complete control, or whether the statute gives Congress "sufficient control over the surrogate legislator to ensure that Congress is able to perform its constitutionally assigned duties"? Of course we would have none of that. Once we determined that a purely legislative power was at issue we would require it to be exercised, wholly and

entirely, by Congress. Or to bring the point closer to home, consider a statute giving to non-Article III judges just a tiny bit of purely judicial power in a relatively insignificant field, with substantial control, though not total control, in the courts-perhaps "clear error" review, which would be a fair judicial equivalent of the Attorney General's "for cause" removal power here. Is there any doubt that we would not pause to inquire whether the matter was "so central to the functioning of the Judicial Branch" as really to require complete control, or whether we retained "sufficient control over the matters to be decided that we are able to perform our constitutionally assigned duties"? We would say that our "constitutionally assigned duties" include complete control over all exercises of the judicial power-or, as the plurality opinion said in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U. S. 50, 58-59 (1982): "The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." We should say here that the President's constitutionally assigned duties include complete control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. See Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e et seq. (prohibiting "employers," not defined to include the United States, from discriminating on the basis of race, color, religion, sex, or national origin). No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. See *United States v. Will*, 449 U. S. 200, 211-217 (1980). A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. As we reiterate this very day, "[i]t is a truism that constitutional protections have costs." *Coy v. Iowa*, post, at 1020. While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty. The checks against any branch's abuse of its exclusive powers are twofold: First, retaliation by one of the other branch's use of its exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes, cf. *United States v. Lovett*, 328 U. S. 303 (1946); and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches (the branches more "dangerous to the political rights of the Constitution," *Federalist* No. 78, p. 465) who are guilty of abuse. Political pressures produced special prosecutors -for Teapot Dome and for Watergate, for example-long before this statute created the independent

counsel. See Act of Feb. 8, 1924, ch. 16, 43 Stat. 5-6; 38 Fed. Reg. 30738 (1973)

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours -in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply announces, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. Having abandoned as the basis for our decision making the text of Article II that "the executive Power" must be vested in the President, the Court does not even attempt to craft a substitute criterion-a "justiciable standard," see, e. g., *Baker v. Carr* 369 U. S. 186, 210 (1962); *Coleman v. Miller*, 307 U. S. 433, 454-455 (1939), however remote from the Constitution-that today governs, and in the future will govern, the decision of such questions. Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

In my view, moreover, even as an ad hoc, standardless judgment the Court's conclusion must be wrong. Before this statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged-insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. See U. S. Const., Art. I, § 6, cI. 1; *Gravel v. United States*, 408 U. S. 606 (1972). It is the very object of this legislation to eliminate that assurance of a sympathetic forum. Unless it can honestly be said that there are "no reasonable grounds to believe" that further investigation is warranted, further investigation must ensue; and the conduct of the investigation, and determination of whether to prosecute, will be given to a person neither selected by nor subject to the control of the President-who will in turn assemble a staff by finding out, presumably, who is willing to put aside whatever else they are doing, for an indeterminate period

of time, in order to investigate and prosecute the President or a particular named individual in his administration. The prospect is frightening (as I will discuss at some greater length at the conclusion of this opinion) even outside the context of a bitter, inter-branch political dispute. Perhaps the boldness of the President himself will not be affected-though I am not even sure of that. (How much easier it is for Congress, instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds -or, for that matter, how easy it is for one of the President's political foes outside of Congress-simply to trigger a debilitating criminal investigation of the Chief Executive under this law.) But as for the President's high-level assistants, who typically have no political base of support, it is as utterly unrealistic to think that they will not be intimidated by this prospect, and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected, as it would be to think that the Members of Congress and their staffs would be unaffected by replacing the Speech or Debate Clause with a similar provision. It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed.

Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations. That they could not remotely be described as merely the application of "normal" investigatory and prosecutory standards is demonstrated by, in addition to the language of the statute ("no reasonable grounds to believe"), the following facts: Congress appropriates approximately $50 million annually for general legal activities, salaries, and expenses of the Criminal Division of the Department of Justice.

As I indicated earlier, the basic separation-of-powers principles I have discussed are what give life and content to our jurisprudence concerning the President's power to appoint and remove officers. The

same result of unconstitutionality is therefore plainly indicated by our case law in these areas. Article II, § 2, cl. 2, of the Constitution provides as follows: "[The President] shall nominate, and by and with the Advice and Consent of the the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Because appellant (who all parties and the Court agree is an officer of the United States, ante, at 671, n. 12) was not appointed by the President with the advice and consent of the Senate, but rather by the Special Division of the United States Court of Appeals, her appointment is constitutional only if (1) she is an "inferior" officer within the meaning of the above Clause, and (2) Congress may vest her appointment in a court of law. As to the first of these inquiries, the Court does not attempt to "decide exactly" what establishes the line between principal and "inferior" officers, but is confident that, whatever the line may be, appellant "clearly falls on the 'inferior officer' side" of it. The Court gives three reasons: First, she "is subject to removal by a higher Executive Branch official," namely, the Attorney General. Second, she is "empowered by the Act to perform only certain, limited duties." Third, her office is "limited in jurisdiction" and "limited in tenure." The first of these lends no support to the view that appellant is an inferior officer. Appellant is removable only for "good cause" or physical or mental incapacity. By contrast, most (if not all) principal officers in the Executive Branch may be removed by the President at will. I fail to see how the fact that appellant is more difficult to remove than most principal officers helps to establish that she is an inferior officer. And I do not see how it could possibly make any difference to her superior or inferior status that the President's limited power to remove her must be exercised through the Attorney General. If she were removable at will by the Attorney General, then she would be subordinate to him and thus properly designated as inferior; but the Court essentially admits that she is not subordinate. If it were common usage to refer to someone as "inferior" who is subject to removal for cause by another, then one would say that the President is "inferior" to Congress.

The second reason offered by the Court-that appellant performs only certain, limited duties-may be relevant to whether she is an inferior officer, but it mischaracterizes the extent of her powers. As the Court states: "Admittedly, the Act delegates to appellant [the] 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice.'" Moreover, in addition to this general grant of power she is given a broad range of specifically enumerated powers, including a power not even the Attorney General possesses: to "contes[t] in court ... any claim of privilege or attempt to withhold evidence on grounds

of national security." Once all of this is "admitted," it seems to me impossible to maintain that appellant's authority is so "limited" as to render her an inferior officer. The Court seeks to brush this away by asserting that the independent counsel's power does not include any authority to "formulate policy for the Government or the Executive Branch." But the same could be said for all officers of the Government, with the single exception of the President. All of them only formulate policy within their respective spheres of responsibility-as does the independent counsel, who must comply with the policies of the Department of Justice only to the extent possible.

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https://tile.loc.gov/storage-services/service/ll/usrep/usrep487/usrep487654/usrep487654.pdf

All human beings are prone to lose his or her focus and inner consciousness owing to the physiological and biological changes that can influence ones thought process, but that cannot be defended in a court of law. In an action for damages for negligence, the plaintiff must prove that the defendant should have had a duty of care towards the plaintiff and that defendant had breached that duty and as a result the plaintiff suffered damage. In *Mckew v Holland & Hennen & Cubbits Ltd*, [1]the court held that defendant was having a medical condition borne out of an accident and having been cognizant of the physical condition, defendant took yet another risk and got injured thus broke the chain of causation of the first accident. Reid, J says in the judgement that "if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is *novus actus interveniens*. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defender's fault or the disability caused by it. Or one may say that unreasonable conduct of the pursuer and what follows from it is not the natural and probable result of the original fault of the defender or of the ensuing disability. I do not think that foreseeability comes into this. A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other *novus actus interveniens* as being quite likely. But that does not mean that the defender must pay for damage caused by the *novus actus*". An intervening act can also arise from a public functionary either through commission or omission. The doctrine must be looked at afresh to bring in laws to codify the principle so that public authorities too must be taken to task.

[1] *McKew v Holland & Hannen & Cubitts* (Scotland) Ltd. [1969] 3 All ER 1621

The much celebrated case *Donoghue v Stevenson*[2] opened the flood gates on the Doctrine of Duty of Care and case law developed over the years and ended up producing a huge corpus of jurisprudence on the law of negligence and damages and it evolved into producing a hefty publication *McGreggor on Damages* – a common law publication - by Sweet and Maxwell and has now reached its 21st Edition. There are a number of text books published in the U.S and in the Commonwealth countries. The 'neighbour principles' has been watered down in view of the advent of technology. The living standards have undergone tremendous changes and the society at large is now hooked on to technology. Since there is greater connectivity among the members of the society through social media and telecommunications technology, the 'neighbour principle' could now be extended to the internet and the mobile phone. As such a holistic look into 'neighbour principle' must now be extended to an elected responsible government as well.

Could a vulnerable member of the society either a minor or an older person with medical complications rely on the technology, GPS system, Google Earth map, to call for an Ambulance in a medical emergency. Should the Doctrine of Duty of Care now be extended to public law sphere where Human Rights conventions and Bill of Rights are now anchored? If the Municipality, Hospitals, Police or Ambulance Service is connected through electronic paraphernalia then the general public would now be more prone to bring litigation against the public authorities if the emergency response is delayed in which case charges could be brought against the public service provider in tort liability.

The Principles of the Doctrine of Duty of Care was espoused by Lord Atkin in the pivotal case of *Donoghue v Stevenson* in 1932.[3] Lord Atkins could not possibly have imagined the technological advances that we are enjoying now. He said then "*You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*" Should the public authorities be more concerned about the vulnerable people in the society? Should the Government be held responsible if it fails to warn of an impending calamitous weather conditions or failure to clear road traffic so that an Ambulance or Police response vehicle could have made its way to help a patient or a victim of a crime? What standard of care should the government take to minimize the human suffering and property damage?

The doctrine of 'duty of care' has also been articulated by Lord Wilberforce in *Anns V. Merton London Borrow Council*[4] "whether there is sufficient relationship of proximity or neighbourhood, such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises" and the second test is, if the above is affirmative, whether there are grounds "which ought to negative, or reduce or limit the scope of duty or the class of person to whom it owed or the damages to which a breach of it may give rise".

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[2] *Donoghue v Stevenson* [1932] A.C. 562, [1932] UKHL 100

[3] *Ibid*

[4] *Anns v Merton London Borough Council* [1978] AC 728

As Turton[5] argues that "proximity factors include: the extent of the defendant's control over the risk, whether the defendant created the risk, the extent of the defendant's knowledge of the risk, the magnitude of the risk and degree of foreseeability of the harm, the extent of the claimant's vulnerability to harm arising from the risk, the extent to which the claimant relied on the defendant, whether the defendant knew of that reliance and whether the defendant can be said to have assumed a responsibility, either to the claimant or for a particular task". This may now extend to public law, the Government operations are now fully connected to the Internet it collects biometrics. It has access to updated electoral registers and details on the people who depend on doles. It can access records from Hospitals as to who needs emergency medical care. The Governments also maintains a network to monitor citizen movements on national security grounds. The Government does have a much broader control over the citizen movements that was the case *with Donaheu v Stevenson* in 1932. The *Donahoe* principle has polarised and the issue must be looked at from a public law perspective. The duty of government towards the citizens was amply demonstrated when the Covid pandemic hit the world. The emergency response to Covid 19 had a devastating effect on the livelihood of people across the world. Its prevention, subsequent management and the mitigation of the spread of Covid 19 had brought along with it new ideas on the Doctrine of Duty of Care by the government towards the citizens.

[5] Turton, J., 2012, *A critical analysis of the current approach of the courts and academics to the problem of evidential uncertainty in causation in tort law*, PhD Thesis, University of Birmingham. p.45 https://etheses.bham.ac.uk/id/eprint/3943/1/Turton13PhD.pdf accessed 15 June 2022

Litigation in Australia

The Doctrine of Duty of Care was examined in *Crimmins v Stevedoring Committee* [6] in which Gleeson CJ, said 'In the context of the powers and functions set out above, it is claimed that the Authority failed to warn of the dangers of asbestos, failed to instruct as to those dangers, failed to provide respiratory equipment, failed to encourage employers to introduce safety measures for the handling of asbestos, failed to ensure that employees were aware of the risks of exposure to asbestos and failed to properly inspect the conditions under which stevedoring operations were carried out'. Gleeson CJ's remarks do have an impact on public law. An Authority is necessarily an arm of the Government which provides a public function. If one were to go by this argument, the Government would be bound by the principles of morality, responsibility and accountability to protect people from all dangers, including proper warning on an impending calamity, a bushfire, a calamitous climate, and a tornado. The adverse effects of these are to a great extent can either be controlled prior to its occurrence or measures could be taken to mitigate its effect on people, their property and livelihood and assessment of lost opportunities and financial loss. Does the Government have a duty of care to make due measure to prevent such a calamitous scenario. The International Convention on Political and Civil Rights ICCPR stipulates that Government must take reasonable measures to promote political and civil rights. There are a raft of international conventions that has a bearing on the measures to be adopted by governments

The common law doctrine must now be codified as in the case of incorporating

[6] *Crimmins v Stevedoring Committee* [1999] HCA 59; 200 CLR 1; 167 ALR 1; 74 ALJR 1 (10 November 1999)

provisions of the UDHR/ICCPR in the constitution. A similar effort must be made to codify the doctrine. The civil liability of the public authorities must be spelt out and it gives the public authority to pass muster a special test on the Duty of Care principle when new policies are adopted. This does have a bearing on risk management portfolio of a public authority. This doctrine must be looked at by the **Accounting Standards Board** for a provision to be made in the financial accounts. The insurance companies can adopt a risk policy based on the risk spread in a public authority as to the potential litigation that might arise from the 'Doctrine of Duty of Care'.

In Graham *Barclay Osyters Pty Ltd v Ryan*,[7] Gummow and Hayne JJ said 'An evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multifaceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute. In particular categories of cases, some features will be of increased significance. However, Gleeson CJ cautioned that 'there are limits to the extent to which that is possible'. However the Court has not taken cognizance of the utility of technological advances and the access to information by the public authorities can have. The Risk mitigation should now be part of the administrative procedure and must take into consideration the potential hazards and liability in negligence, the authority would be liable for. However **Kirby J** said that 'the presence of foreseeability and factual features linking the parties does not automatically require the finding of a legal obligation to take care — it is for the court to determine the 'ultimate question' of whether a duty ought to be recognised. The court must exercise its discretion in determining whether to recognise the duty and, thus, a legal obligation owed by the defendant to the plaintiff'.[8]

Litigation in Canada

Prof Joost Blom has articulated that 'the Anns test originated in 1978 as a response to the pressure to adapt negligence law to new types of defendant (mainly public authorities or others exercising statutory authority), new types of damage (mainly pure economic loss), and new types of duty (mainly duties to take positive steps to protect the interests of another). *Anns v. Merton London Borough Council* itself involved all three. The claim was for pure economic loss suffered by the owners (on long leases) of flats in a building. The foundations had allegedly been negligently inspected, or not inspected at all, by the local authority so that the flats suffered structural damage. 4 The question of duty of care was argued as a preliminary question'.[9]

[7] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540

[8] Christian Witting, 'Tort Law, Polity and the High Court of Australia', Melbourne University Law Review. 2007.p.575

[9] Joost Blom, 'Do we really need Anns test for Duty of Care in Negligence' Alberta Law Review 2016, p.895

The Supreme Court of Canada, in *Nelson (City) v. Marchi*, [10], looked into an issue involving an accident where the plaintiff suffered. City employees had plowed the snow to the top of the parking spaces, creating a continuous snowbank along the curb that separated the parking stalls from the sidewalk. The City employees had not cleared an access route to the sidewalk for drivers parking in the stalls. Plaintiff parked in one of the angled parking stalls. She was attempting to access a business, but the snowbank created by the city blocked her route to the sidewalk. She decided to cross the snowbank and seriously injured her leg. She sued the city for negligence. The trial judge dismissed her claim concluding that the city did not owe her a duty of care because its snow removal decisions were **'core policy decision'**. In the alternative, he also found that there was no breach of the standard of care and that in the further alternative, if there was a breach, she was the proximate cause of her own injuries. The trial judge went a little further and said Plaintiff assumed the risk in crossing the snowbank shifted the blame squarely on her as she was the "author of her own misfortune. An Authority cannot possibly say that trenches had been dug along the road for laying City drainage lines for the benefit of the populace when the work had been done in breach of basis safety measures. The 'core policy decision' cannot possibly transcend the basic safety measures.

The Canadian Supreme Court said "Core policy decisions are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. Core policy decisions are immune from negligence liability because the legislative and executive branches have core institutional roles and competencies that must be protected from interference by the judiciary's private law oversight. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the rationale for core policy immunity. In addition, four factors emerge that help in assessing the nature of a government's decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria. The underlying rationale — protecting the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers — serves as an overarching guiding principle for how to weigh the factors in the analysis. Thus, the nature of the decision along with the hallmarks and factors that inform its nature must be assessed in light of the purpose animating core policy immunity. But the mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy. Further, the fact that the word "policy" is found in a written document, or that a plan is labelled as "policy" may be misleading and is certainly not determinative of the question". The exclusion of the Core policy must be based on legislative criteria which such decision are shielded from judicial review. However the principles enumerated in the *Animinic v Foreign Compensation Commission* [11] would surface then as to the merits of the decision itself. Judiciary alone can be left to affirm the decisions of a public authority unless the decision is subjected to merits review. The Executive must come up with exclusions of judicial review of the decisions of an Authority if it

[10] *Nelson (City) v. Marchi*, 2021 SCC 41 (CanLII)

[11] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208

infringes on liability towards the citizens and remedies for such decisions must also be made available as remedy for executive actions are pre-requisites in keeping with the requirements of human rights treaties etc.

Standard of Care in the U.S

In the United States, Federal Tort Claims Act - FTCA provides cover for individuals who are incapacitated, wounded or otherwise whose properties are damaged by the wrongful or negligent act of a government employee acting in the scope of his or her official duties may file a claim with the government for reimbursement for that injury or damage. However claims are entertained only if (1) he was injured or his property was damaged by a federal government employee; (2) the employee was acting within the scope of his official duties; (3) the employee was acting negligently or wrongfully; and (4) the negligent or wrongful act proximately caused the injury or damage of which he complains. The claimant must also provide documentation establishing that his claim satisfies all the elements of the FTCA.[12]

One classic definition of 'standard of care' for the 'tort of negligence' is amply demonstrated by Judge Learned Hand's oft quoted opinion in *U.S v Caroll Towing Co.*[13] The case arose as a result of sinking of a barge in 1944 in the Port of New York. The issue arose was whether Connors Marine Co which had tied together several of their barges at the pier off Manhattan. The defendants tug boat 'Carroll' removed one of the mooring lines connecting the barges to the peir. Then the remaining mooring lines broke, the barges sank. Since the barges had not been manned at the time, and evidence came to light that if a crew member had been on board, the barges could have been saved. The question that emerged for the Court was whether Connors was liable for failing to have its "bargee" remained on aboard.

Judge Learned Hand wrote that Connor's liability for the lost barge depended on: "It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i. e., whether B › PL. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York

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[12] United States House of Representatives https://www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act accessed 16 June 2022

[13] *U.S v Caroll Towing Co.* 159 F.2d 169 (2d Cir. 1947)

Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in "The Kathryn B. Guinan," supra; and that, if so, the situation is one where custom should control".

Judge Posner's decisions in *U.S Fidelity and Guaranty Co v Plovidba* [14] U. S. Fidelity & Guaranty Co. v. Plovidba, critiqued the mathematical formula of Judge Hand. Posner J said

"Though mathematical in form, the Hand formula does not yield mathematically precise results in practice; that would require that B, P, and L all be quantified, which so far as we know has never been done in an actual lawsuit. Nevertheless, the formula is a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors. It gives federal district courts in maritime cases, where the liability standard is a matter of federal rather than state law, a useful framework for evaluating proposed jury instructions, for deciding motions for directed verdict and for judgment notwithstanding the verdict, and, in nonjury cases, for preparing Rule 52(a) findings. (For a good example of the use of the Hand formula by a district judge in this circuit in preparing Rule 52(a) findings, see Chief Judge Robson's opinion in Ohio River Co. v. Continental Grain Co., 352 F. Supp. 505, 509 (N.D. Ill. 1972).) We do not want to force the district courts into a straitjacket, so we do not hold that they must use the Hand formula in all maritime negligence cases. We merely commend it to them as a useful tool-one we have found helpful in this case in evaluating the plaintiff's challenge to the jury instructions and its contention that negligence was shown as a matter of law"[15]

When it comes to public authorities they must ensure optimal level of care[16] to safe guard the uses of public authority's facilities. Could a citizen become careless knowing full well that Authority would ensure optimal level of care and become less serious about his behaviour? Lets take for an example, a children's park managed by the City should ensure that it is a safe place for the Children to engage in leisure activities. Should the City take into account possible scenarios children might venture into accidently? Should the parents or guardians be equally circumspect of the Children's behaviour? Should the children be left unattended all the time – impractical though? The equipment's in the leisure park must be operational and must be checked by the City for safety reasons. However the nature of the operations should have a 'heightened level of care' because of the nature of activities and behaviour expected from Children. Should the guardians and parents be made aware of the risks inherent before Children are admitted to the leisure park? This should be so with employees who are exposed to a heightened area of risk, of being harmed if a wrong move is made. This type of a scenario could be avoided if adequate precautions are taken and guidelines of use of facilities. In some industrial sites, safety training is mandatory and all employees irrespective of their blue collar of white collar all must undergo safety training and they are given a certificate of attendance after they have undergone the training. This would mitigate the level of liability by the employer. This has been a practice at the Dubai Drydocks LLC in UAE where all employees must undergone safety training. This paper has not looked into the sovereign immunity of the Government of UAE towards private

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[14] *United States Fidelity & Guaranty Company, Plaintiff-appellant, v. Jadranska Slobodna Plovidba*, Defendant-appellee, 683 F.2d 1022 (7th Cir. 1982)

[15] *Ibid*

[16] Economic Analysis of Alternative Standards of Liability in Accident Law

https://cyber.harvard.edu/bridge/LawEconomics/neg-liab.htm accessed 16 June 2022

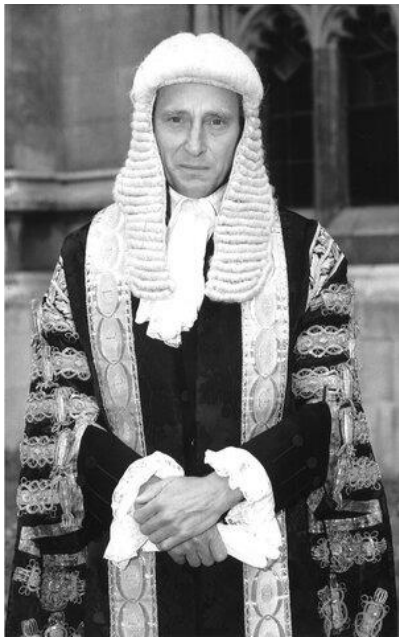
individuals who could challenge the government on tort liability whereas in the U.S sovereign immunity was abolished when it adopted the FTCA.

An interesting point has been raised by G. Michael Harz[17] that the U.S 'Congress has removed the federal government's cloak of sovereign immunity, thereby requiring the United States to account for its negligence.[18] He says the plain meaning of the Federal Tort Claims Act, FTCA along with common sense, require fault to be imposed on the United States in the same manner it is imposed on individuals. The federal government according to Harz, exists to serve the people.[19] Harz says 'the only way the government can serve in a fair and just manner is if it acts responsibly. [20]This does not mean it will always act correctly. People make mistakes. The government, being no more than an aggregate of people, will likewise err. In order to act responsibly, the government must accept the consequences of its inevitable errors. As our government realizes this and begins to accept responsibility for its acts, it will begin to better serve those who created it'.[21]

The Principles of the Doctrine of Duty of Care was espoused by Lord Atkin in the pivotal case of *Donoghue v Stevenson* in 1932.[1] Lord Atkins could not possibly have imagined the technological advances that we are enjoying now. He said then *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."* Should the public authorities be more concerned about the vulnerable people in the society? Should the Government be held responsible if it fails to warn of an impending calamitous weather conditions or failure to clear road traffic so that an Ambulance or Police response vehicle could have made its way to help a patient or a victim of a crime? What standard of care should the government take to minimize the human suffering and property damage?

[17] G.Michael Harz, 'Liability of the United States Go Liability of the United States Government under the Federal Tort Claims Act', Denver University Law Review, p.618
[18] *Ibid,*
[19] *Ibid*
[20] *Ibid*
[21] *Ibid*

Legal Quotes - Lord Bingham QC On The Rule of Law.



The Rule of Law as defined by Lord Bingham,

They are that:

-the law must be accessible, intelligible, clear and predictable;

-questions of legal rights and liability should ordinarily be resolved by the exercise of the law rather than by discretion;

-laws should apply equally to all, except where differential treatment is justified objectively;

-Ministers and public officials must exercise the powers conferred reasonably, in good faith, fairly, within their powers and for the purposes for which they were conferred;

-the law must afford adequate protection of fundamental Human Rights;

-the State must provide a way of resolving disputes which the parties cannot themselves resolve;

-adjudicative procedures provided by the State should be fair;

-the State should comply with its international law obligations.

The Anglo-American LAWYER MAGAZINE

SPECIAL MESSAGE TO THE PRESIDENT OF THE UNITED STATES OF AMERICA JOE BIDEN

NATIONAL SECURITY OF CANADA, UK, NATO, ISRAEL, INDIA, JAPAN, SOUTH KOREA , AUSTRALIA AND NEW ZEALAND

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the nation, from the military commanders and the civil government as a result you will not be able to communicate with U.S allies viz., Canada, UK, Europe/ NATO, Israel, Japan, India, Japan, South Korea, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the World would feel triumphant and forge new strategic alliances. We, KC – The Anglo-American Lawyer Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. Could there be 'a standby constitution'. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

God Bless America

OVER TO YOU MR. PRESIDENT

SRINATH FERNANDO, EDITOR-IN-CHIEF,
THE ANGLO-AMERICAN LAWYER MAGAZINE
No. 7/1, 4TH LANE, RAWATHAWATTA, MORATUWA, SRI LANKA
TEL 0094 72 0622 482

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